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Negligence-Physician and Surgeon-Expert Testimony

NEGLIGENCE—PHYSICIAN AND SURGEON—EXPERT TESTIMONY—Appellant, a surgeon, performed a surgical operation on appellee to remove a tumor "or growth of some kind" from appellee's abdominal cavity. An absorbent sponge used to "wall off" the intestines was left in the incision which caused irritation and made a second operation necessary for its removal. Appellee sued for damages caused by the alleged negligence of the appellant in letting the sponge remain. Nurses were relied on by the appellant to check the number of sponges to be used that all were removed. By testimony of physicians and surgeons, appellant proved on the trial that the recognized and accepted methods of surgery had been followed. There was no testimony of a physician or surgeon to the contrary. A jury found for the appellee and the trial court entered judgment in her favor upon the verdict. The Appellate Court reversed the trial court, holding that the question of whether or not a physician or surgeon has in a given case exercised reasonable care is a question of science for experts. The Supreme Court transferred the cause under Section 1357, Cl. 2, Burns 1926, Acts 1901, p. 565, and affirmed the judgment of the trial court.[1]

It was contended by appellant that testimony of experts was necessary to prove the alleged negligence of the appellant and the Appellate Court so held. Most of the malpractice cases involve a failure in duty or lack of skill. This is ordinarily a question of scientific knowledge about which the layman is not competent to testify and when an issue does involve scientific knowledge, expert testimony is necessary.[2] Authorities are numerous to sustain this proposition. But this rule applies only where a scientific question is involved. There are apparent exceptions to this general rule as where the defendant is so clearly at fault that no scientific knowledge is necessary to place that fault, and therefore no expert testimony is required.[3] The instant case is such a case. Speaking of the similar case of *Ault v. Hall, supra,* where nurses were relied on to count the sponges, Professor Francis H. Bohlen said: "The Supreme Court of Ohio, none the less held that the jury might find that the surgeon was liable. At first glance this seems contrary to the general view of American courts in regard to the liability of physicians. However, the general rule applies only to determine the professional skill, the extent of knowledge of the act which a patient in a particular locality is entitled to expect. Of such matters the ordinary lay witness is no judge, or at least the medical pro-

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[1] *Funk v. Bonham,* Supreme Court of Indiana, July 29, 1932, 183 N. E. 312.

[2] *Ewing v. Goode* (1897), 78 Fed. 442; *Adolay v. Miller* (1916), 60 Ind. App. 656, 111 N. E. 313; *Longfellow v. Vernon* (1914), 57 Ind. App. 611, 105 N. E. 178; *Jackson v. Burnham* (1895), 20 Colo. 532, 39 Pac. 577; *Sawyer v. Berthold* (1912), 116 Minn. 441, 134 N. W. 120; *McCoy v. Buck* (1927), 87 Ind. App. 433, 157 N. E. 456.

[3] *Evans v. Roberts* (1915), 172 Iowa 653, 154 N. W. 923; *Wharton v. Warner* (1913), 75 Wash. 470, 135 Pac. 235, 237; *Reynolds v. Smith* (1910), 148 Iowa 271, 127 N. W. 192; *Walker Hospital v. Pulley* (1920), 74 Ind. App. 659, 664, 127 N. E. 559; *Ault v. Hall* (1928), 119 Ohio St. 422, 164 N. E. 518.

fession has staunchly maintained and succeeded in legally establishing its contention, that only the medical and surgical profession can determine what is good medical and surgical practice. In so far as the matter lies in the realm of purely professional competence, this view seems to be universally held. The question presented in *Ault v. Hall* requires no medical knowledge to solve. It is not a question of diagnosis or of the manner in which a particular operation is to be performed. The ordinary layman is quite as competent as the most experienced surgeon to realize the danger of so purely a routine practice as that of counting sponges after an operation so as to make sure that all that were provided are accounted for. In a word, this case shows that even where the conduct of a physician is concerned the standard of the profession is to apply only in matters of medical art, and do not include those matters which lie within the knowledge and judgment of laymen."[4] In such a case the doctrine of *res ipsa loquitur* applies.[5] The surgeon has complete control of the situation, there is no necessity for dealing with matters of scientific knowledge, and the injury is one which would not ordinarily occur.

One recent case has gone even further. In *McCormick v. Jones*, the jury found for the defendant. This meant they found either no negligence or no damage. The Supreme Court of Washington there ruled that there was negligence as a matter of law saying: "We also think that the court can say as a matter of law that when a surgeon inadvertently introduces into a wound a foreign substance, closes the wound, leaving that foreign substance in the body, there being no possibility of any good purpose resulting therefrom, that act constitutes negligence."[6]

Here the appellant did not claim that any good result could come from letting the sponge remain in the incision. Had he so contended, scientific knowledge would be necessary and expert testimony would have been required under the general rule. He claimed that he used ordinary care to guard against leaving the sponge in appellee's abdomen. But following even a reasonable custom does not necessarily establish freedom from negligence in a particular case. It is merely a circumstance to be weighed by the jury.[7]

The appellant further insists that if any negligence was shown, it was negligence upon the part of the nurses who assisted in the operation and who were employed by the hospital, and not negligence on his part. Here the appellant was employed to perform a surgical operation upon the person of the appellee. Performance of the operation has been held to include all acts from the opening of the incision to the closing of that incision. The Georgia Supreme Court has said: "It seems to us that the operation begins when the opening is made into the body and ends when this opening has been closed in a proper way, after all appliances necessary to the

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[4] 4 Tulane L. Rev. 370.

[5] *Sellers v. Noah* (1923), 209 Ala. 103, 95 So. 167; *Davis v. Kerr* (1913), 239 Pa. 551, 86 Atl. 1007; *Reynolds v. Smith* (1910), 148 Iowa 271, 127 N. W. 192; *Evans v. Munro* (1912), 83 Atl. 82; *Benson v. Dean* (1921), 232 N. Y. 52, 133 N. E. 125.

[6] *McCormick v. Jones* (1929), 152 Wash. 508, 278 Pac. 181.

[7] *Davis v. Kerr* (1913), 239 Pa. 551, 86 Atl. 1007; *Evans v. Munro* (1912), 83 Atl. 82; *Sellers v. Noah* (1923), 209 Ala. 103, 95 So. 167; *Ault v. Hall* (1928), 119 Ohio St. 422, 164 N. E. 518.

successful operation have been removed from the body."[8] It would perhaps be reasonable in some instances to provide for another surgeon to close the incision, but in the absence of such a provision the only reasonable understanding as to the undertaking of the surgeon is that performing the operation includes closing the incision and the duty to remove all foreign substances from the wound is an integral part of the operation.[9] This duty can now be avoided and a hospital rule requiring attending nurses to tally the sponges used and removed will not relieve the surgeon of liability for a sponge negligently left in the wound.[10] The fact that the nurses used in the operation are the nurses of the hospital and that the hospital is not owned or controlled by the surgeon do not relieve the surgeon. As to the master and servant relationship when the servant is used by another, the Appellate Court of Indiana has said: "The true test in such cases is to ascertain who directed the movement of the person committing the injury. When one person lends a servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."[11] Under this test the nurses in the instant case were the servants of the operating surgeon.[12]

It appears that the courts have taken three distinct views as to the so-called "sponge cases." First, that such cases are no different from the ordinary malpractice case and expert testimony alone is admissible in evidence to prove the surgeon's negligence.[13] Second, that a case of a sponge being left in the incision is an apparent exception to the ordinary malpractice case and no expert testimony is required to warrant the jury in finding the surgeon negligent.[14] And third, that where a surgeon leaves a sponge in a patient's body, "there being no possibility of any good purpose resulting therefrom," that act constitutes negligence as a matter of law.[15] For this class of border line case the Indiana Supreme Court has adopted the second and middle view.

J. S. H.

PLEADINGS—CONSTRUCTION—PLAINTIFF MUST ALLEGE COMPLIANCE WITH STATUTE—This was an action of tort for fraud of an alleged agent in respect to duty arising out of contract. Plaintiff alleged that he was engaged in real estate business in Mississippi and a non-resident of Indiana; that

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[8] *Akridge v. Noble* (1902), 114 Ga. 949, 41 S. E. 78.

[9] *Palmer v. Humiston* (1913), 87 Ohio St. 401, 101 N. E. 283; *Harris v. Fall* (1910), 177 Fed. 79; *Akridge v. Noble* (1902), 114 Ga. 949, 41 S. E. 78; *McCormick v. Jones* (1929), 152 Wash. 508, 278 Pac. 181; *Gillette v. Tucker* (1902), 67 Ohio St. 106, 65 N. E. 865.

[10] *Spears v. McKinnon* (1924), 168 Ark. 357, 270 S. W. 524; *Barnett's Adm'r v. Brand* (1915), 165 Ky. 616, 177 S. W. 461; *Davis v. Kerr* (1913), 239 Pa. 551, 86 Atl. 1007; *Palmer v. Humiston* (1913), 87 Ohio St. 401, 101 N. E. 283. See 21 R. C. L. 388.

[11] *Sargent Paint Co. v. Petrovitz* (1919), 71 Ind. App. 367, 124 N. E. 883, 885.

[12] Discussed in 3 Ind. L. J. 474.

[13] *Blackburn v. Baker* (1929), 237 N. Y. S. 611; *Guell v. Tenny* (1928), 262 Mass. 54, 159 N. E. 451.

[14] *Ault v. Hall* (1928), 119 Ohio St. 422, 164 N. E. 518; *Walker Hospital v. Pulley* (1920), 74 Ind. App. 659, 664, 127 N. E. 559.

[15] *McCormick v. Jones* (1929), 152 Wash. 508, 278 Pac. 181.